No. 106.

Supreme Court of the United States.

ARIZONA COPPER COMPANY, LIMITED,
Appellant,

against

WILLIAM ALLEN GILLESPIE,
Appellee.

BRIEF FOR APPELLANT.

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Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 106.

ARIZONA COPPER COMPANY, Limited,
Appellant,

AGAINST

WILLIAM ALLEN GILLESPIE,
Respondent.

Brief for Appellant.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

NOTE: For greater precision and convenience, the references to the Record are to the original or marginal pages.

Statement.

The suit was commenced by the appellee in September, 1906, in the District Court of the Territory of Arizona, Graham County, against the appellant, a Scotch corporation (pp. 1, 16) and against the Shannon Copper Company and The Arizona Copper Company, an Arizona corporation, to enjoin the three defendants from depositing in the waters of the Gila River, or its affluents, any slimes, tailings, concentrates or chemicals (p. 13).

On motion of the plaintiff's attorney, the complaint was dismissed as to the Shannon Copper Company and the Ari-

zona Copper Company (the Arizona corporation), and continued only against the appellant, The Arizona Copper Company, Limited (p. 24). The dismissal as to the Shannon Company was owing to an agreement on its part to do everything possible to minimize the flow of tailings and waste materials from its works into the River (p. 115).

Upon the trial, the District Court, in November, 1907, directed a most sweeping and drastic judgment against the appellant, enjoining it from "*in any wise*, or *in any manner* depositing or suffering or permitting to be deposited or suffering or permitting to flow into the waters of the Gila River," or its tributaries, *any* slime, slickens or tailings (p. 25).

On appeal, this judgment was affirmed by the Supreme Court of Arizona, in March, 1909, with the modification that the trial Court, in its discretion, might subsequently, "upon a proper showing" of efforts "to *effectually* dispose of" the tailings and slimes, modify the injunction in accordance with the conditions shown to exist (p. 76).

An appeal to this Court was thereupon allowed and taken, in February, 1910, the amount involved being in excess of $5,000 (pp. 89-90); and it being made to appear to the Supreme Court of the Territory that, since the commencement of the action, the appellant had constructed and put into operation "large and expensive settling basins and other means and devices designed and intended to arrest, settle and dispose of the slimes, slickens and tailings" and had succeeded in arresting and impounding and disposing of the "*major* portion" of such refuse, the operation of the injunction was suspended during the pendency of the appeal, upon condition that the Company should install and operate such further and other means and devices as might be necessary to keep, so far as practically possible, the objectionable matter from escaping into the Gila River or its tributaries, and upon the further condition that the appellant should give a bond in the sum of $20,000 for any damages that might be sustained, and also

pay an inspector, appointed by the Court, a salary of $150 a month to keep watch of the Company's efforts (p. 92).

In the ordinary process of reducing copper ores, the ores are crushed and mixed with water (p. 108); and the slimes, slickens and tailings are a necessary consequence of the reduction process, being the finely pulverized rock which is left suspended in the water used in the process (p. 110).

Other facts found by the Supreme Court

(pp. 101–116).

No complaint is made of the rulings of the Court upon questions of evidence; and the only question that can be considered upon this appeal is whether, on the facts found by the Supreme Court, the decree was properly made.

Sturr v. Beck, 133 U. S., 541, 546.

Briefly summarized, the essential facts found by the Court below are as follows:

The appellee is the owner of 276 acres of arid land, under irrigation, near the town of Solomonsville, in Graham County, Arizona. This land has been supplied with water from the Gila River, by means of the Montezuma Canal, into which the waters of the Gila River have been diverted, at a point about 25 miles below the confluence of the San Francisco and Gila Rivers (p. 104) near Clifton, in Graham County (p. 102).

No reduction works of the appellant are nearer to the land of the appellee than Clifton (pp. 106–7). The land of the appellee is thus situated at a distance of about 25 miles from the nearest works of the appellant. Portions of this land have been under cultivation, through the use of this water, since about 1872; and the whole of it has been continuously and profitably cultivated during the past fifteen years (p. 103); and excellent and varied crops have been and are now being raised upon the land (pp. 105–6).

The Gila River rises in New Mexico and flows in a westerly direction through Graham County and the other southerly Counties of Arizona, emptying into the Colorado River at the extreme southwestern boundary of the State, at Yuma (p. 102). Chase Creek empties into the San Francisco River above Clifton (p. 102), and, consequently, at a still greater distance from the Montezuma Canal.

The Gila River flows through "a generally mountainous country" (p. 102). In the mountains through which it flows, in the neighborhood of Clifton, are large deposits of copper ore; and *several large mining companies*, including the appellant, are there engaged in the business of mining and reducing these ores (p. 106, Finding VI).

The mining industry was also commenced about 1872, and has been continuously and increasingly prosecuted ever since. Thus, "the mining industry and the farming industry * * * were commenced about the same time and have each grown and increased in importance to the present time" (p. 106).

In the mining district, near the upper branches and affluents of the Gila River, the appellant "*and other large mining companies*" are engaged in the reduction and treatment of copper ores. Upon these streams (not upon the Gila River itself), and upon the sides of the canyons opening into the streams, the appellant has in operation concentrators, at which are now treated more than 3,000 tons of ore a day, and the appellant's plant represents an investment of about Fifteen million dollars ($15,000,000), employing about 3,000 men; and about 12,000 persons are dependent for their livelihood on the operations of the mining works of the appellant and the other mining companies operating in that District (p. 107). In the process of reducing the ores, a *portion* of the resulting "slimes, slickens and tailings" finds its way into the Gila River and ultimately upon the land of the appellee (p. 108).

The Gila River is a stream of regularly recurring violent extremes of condition, owing to torrential floods, which are

succeeded by seasons of practically no rainfall. At times, it is a raging torrent, sweeping everything before it; and, again, it is a shallow, inert stream, a mere film of water, which, in the course of 25 miles, would act as a natural filter for any mineral matter received from its tributaries. During the periods of flood, it bears along, in its onward rush, quantities of sedimentary matter, the product of erosion of the mountains, hills and valleys (p. 108). At such times, the proportion of slimes and tailings to the entire amount of sedimentary matter is so slight as to be negligible, in determining the effects of the sedimentary deposits upon the cultivated lands (p. 109). It is thus only during low water that any appreciable refuse matter can possibly find its way from the works of the appellant and other mining companies to the plaintiff's land. What minute portion of the entire sedimentary deposits complained of is represented by this refuse matter and what proportion of the latter, if any, is traceable to the appellant's works, was not found, and was not even alleged in the complaint.

The clouding of the waters of the Gila River, as the result of the reduction of ores and the resulting deposit upon the plaintiff's land, was apparently not noticeable, even to the plaintiff, until about six or eight years before the present suit was instituted (p. 110).

In the complaint, it was charged that the deposits from the works of the defendant contained acids and poisonous substances, which poisoned the fish and rendered the water unfit for use (p. 11). No finding to that effect was made by the Court below.

It was also averred in the complaint, as a principal cause of the alleged injury sustained by the plaintiff, that the sediment was deposited near the head of the Montezuma Canal in such large quantities as to raise the banks of the canal, and, consequently, to make it more difficult to obtain the water from the canal for irrigating purposes (pp. 10, 13). This fact was found by the Court below (p. 111); but the Court also

found that the amount of slimes and tailings, in comparison with the total amount of sedimentary matter deposited, was negligible (p. 109). Obviously, this cause of injury cannot be attributed to the appellant.

Another injury complained of and found by the Court was that the sediment (principally that of erosion) buried and choked the plants to such an extent as to interfere with their proper growth (p. 111). This was also a question of quantity and cannot be attributed to the appellant.

The only other injury complained of and found by the Court was that the sediment formed a compact layer over the soil, not readily permeable by water, thus tending to deprive the roots of necessary moisture (p. 109). This difficulty must also result, in large measure, from the quantity of the sediment; but the Court found that it could be obviated by deep plowing and harrowing, except in the case of alfalfa, which is a perennial, making it impossible to plow the land where it is planted, though it may be harrowed (p. 112). The slimes and tailings are not injurious to the soil as the result of any chemical qualities. Indeed, they contain a small quantity of inorganic fertilizing material (p. 110), which is, of course, beneficial, though it is not required upon the land of the appellee. Its objectionable characteristic is that it is so finely pulverized that when it is finally deposited on the land, it forms a more compact mass than the other sedimentary matter, becomes harder when dry, thus being more difficult to plow and harrow, and is, therefore, more injurious than the natural sediment of erosion (pp. 12–13).

On the question of the extent and effect of the sedimentary deposits, the Court below did not confine its findings to the plaintiff's land or to the Montezuma Canal, but included all the land in the upper Gila valley, comprising several thousand acres (p. 104). It also included in its findings other irrigating ditches, the location of which was not even specified (p. 113), except that they are in a territory bordering on the Gila River, for

about 35 miles. Some of them are, therefore, nearer to the appellant's works than the Montezuma Canal, which, as heretofore stated, is about 25 miles below the confluence of the San Francisco and Gila Rivers (p. 104).

That the injuries sustained by the plaintiff were trivial and largely speculative and imaginary, is obvious from the Ninth Finding of the Court, showing that, during the last five years, when alone any complaints were made by the plaintiff (p. 114), his lands have "*greatly increased in market value and selling price.*" That finding is as follows (p. 116):

> "The Court further finds that during the last five years the agricultural lands of the Upper Gila Valley, in the vicinity of Solomonsville, including the lands of the plaintiff, have greatly increased in market value and selling price, and that that portion of said lands which are set to alfalfa and are known as *alfalfa lands have in the last five years increased in value and market price to the same extent* as that portion of said lands adapted to and used in the production of cultivated crops."

As showing the disposition of this appellant to prevent any consequential injuries resulting from the operation of its works, the Court found that Mr. Gillespie first complained to the Company about five years ago, and that, thereupon, the Company commenced and prosecuted the work of arresting the deposit of this waste matter, and, to that end, established large and expensive settling works, at an expenditure of about $50,000; and, at the time of the trial of this cause, it had already succeeded in preventing about 75% of its total waste products from entering the water, including more than 50% of the slimes and tailings (p. 115).

There is no averment or intimation in the complaint, and no finding, that the works of the appellant or of any of the other mining companies have been operated carelessly or could be operated in such manner as to prevent *all* tailings

and fine sediment held in solution from finding its way into the waters of the River. On the contrary, the Court expressly found that it was impossible for the appellant to impound all the sedimentary matter (p. 65), but that this might be done by the farmers, at moderate expense, by constructing settling basins near the heads of the canals (p. 65).

Specification of Error.

Upon the facts found by the Court below, it erred in affirming the decree in favor of the plaintiff and should have granted judgment in favor of the defendant, reversing the decree and dismissing the complaint; because, no reason was shown for granting the plaintiff any equitable relief.

POINTS.

FIRST.

No public nuisance.

I. The complaint was drawn on the theory that the escape of waste matter from the reduction works of the defendant and other mining companies, into the streams emptying into the Gila River, constituted a public nuisance, causing special damage to the plaintiff; and this view was urged upon the Court below by counsel for the appellee, and was adopted by the Court.

Even if the acts complained of constituted a public nuisance, the injury to the plaintiff, as clearly appears from the averments of the complaint, did not differ in kind from that sustained by other members of the community in which the

plaintiff's farm was situated; and, consequently, the plaintiff could not maintain the action.

Joyce on Injunctions, Sec. 1081;
Live Stock Co. v. McIlquan, 14 Wyo., 209;
Donahue v. Stockton Gas, etc. Co., 6 Cal. App., 276, 280;
Kuehn v. Milwaukee, 83 Wis., 583;
Jarvis v. Santa Clara, 52 Cal., 438.

The Court below held that the injury to the plaintiff did differ in kind from that sustained by the other members of the community, and, consequently, that the plaintiff could maintain the action (p. 68).

II. In the conclusion thus reached, the Court was clearly in error; because, all streams of running water in the Territory were made public, for the purposes of irrigation and mining, including, necessarily, as one of the incidents of the latter, the use of water in the reduction of the ores. The statutory provisions upon this subject are as follows (Rev. St. 1901):

"4168. (Sec. 1). The common law doctrine of riparian water rights shall not obtain or be of any force or effect in this territory."

"4169. (Sec. 2). Any person or persons, company or corporation shall have the right to appropriate any of the unappropriated waters or the surplus or flood waters in this territory for delivery to consumers, rental, milling, irrigation, mechanical, domestic stock or any other beneficial purpose, and such person or persons, company or corporation for the purpose of making such appropriation of waters as herein specified, shall have the right to construct and maintain reservoirs, dams, canals, ditches, flumes and any and all other necessary waterways. And the person or persons, company or corporation first appropriating water for the purposes herein mentioned shall always have the better right to the same."

"4174. (Sec. 7). All rivers, creeks and streams of

running water in the Territory of Arizona are hereby declared public, and applicable to the purposes of irrigation *and mining*, as hereinafter provided."

"4178. (Sec. 11). No inhabitant of this territory shall have the right to erect any dam, or build a mill, or place any machinery, or open any sluice, or make any dyke, *except such as are used for mining purposes or the reduction of metals*, as provided for in sections six and seven* of this chapter, that may impede or obstruct the irrigation of any lands or fields, as the right to irrigate the fields and arable lands shall be preferable to all others; and the justices of the peace of the respective precincts shall hear and determine the question relative to all such obstructions in a summary manner, and cause the removal of the same by order directed to the constable of the precinct or sheriff of the county who shall proceed to execute the same without delay."

* Sections 6 and 7 of the Revised Statutes of 1887. The reference should be to Sections 12 and 13.

"4179. (Sec. 12). Where reduction works or other mining apparatus shall be placed upon lands previously held for agricultural purposes, the person or persons so holding such lands shall be entitled to remuneration from the person or persons erecting or owning said reduction works or mining apparatus. The amount of remuneration shall be adjudged by three or five disinterested persons or by the probate judge, as the parties interested shall agree, and in case such agreement can not be made, then *the party injured may bring suit for damages.*"

"4180 (Sec. 13). When any ditch or acequia shall be taken out for agricultural purposes, the person or persons so taking out such ditch or acequia shall have the exclusive right to the water, or so much thereof as shall be necessary for said purposes; and *if at any time the water so required shall be taken for mining operations, the person or persons owning said water, shall be entitled to damages*, to be assessed in the manner provided in section six* of this chapter."

* Should be Section 12.

"4196 (Sec. 29). If any person shall in any manner interfere with, impede or obstruct any of the said acequias, or use the water from it without the consent of the overseer, *except as provided in section seven* of this chapter*, during the time of cultivation, he shall pay for each offense a sum not exceeding ten dollars, which shall be recoverable in the manner prescribed in the foregoing section for the benefit of said acequia; and he shall further pay all damages that may have occurred to the injured parties; and, if such person has not wherewith to pay said fine and damages, he shall be sentenced to fifteen days' labor on said public acequia."

* Should be Section 13.

These provisions are substantially indentical with those contained in the Revised Statutes of 1887 (Secs. 3198-9, 3203-5).

III. If a mining company may lawfully use the streams for the purposes of its business, such use cannot be unlawful or constitute a public nuisance, unless the Company willfully or carelessly so uses the water as to infringe upon the rights of others.

Kinney on Irrigation, Secs. 250, 251;
40 Cyc., 708, 713;
Hill v. Standard Mining Co., 12 Idaho, 223, 236;
Bernard v. Sherley, 135 Ind., 547, 555.

But nothing of that kind was found by the Court below, and nothing of the kind is alleged or intimated in the complaint. Therefore, the suit cannot be maintained on the ground that the reasonable use of the streams of Arizona by the appellant for its mining purposes constitutes a public nuisance *per se*.

IV. Even if the mining industry had not been so clearly authorized by the Legislature, yet, as it is the paramount in-

dustry of the State and overwhelmingly dominates all the other industries, the courts of equity should refuse to treat it as a public nuisance, even though it could not be conducted, by the exercise of reasonable care, without inflicting some injury upon others.

The public convenience will always be considered in determining whether certain acts constitute a nuisance.

Pomeroy's Eq. Remedies, Sec. 529.

SECOND.

Appellee has no exclusive or superior rights as prior appropriator.

A further theory referred to by the lower Courts was that the plaintiff had acquired a prior right to the use of the waters of the Gila River, which could not be interfered with by the use of the waters of its affluents by the defendant for any of the purposes incidental to its mining operations. In accepting this theory, the Court below was also in error.

I. The common law doctrine of riparian rights has not obtained in Arizona since 1887; and it probably has never been recognized there.

Rev. Stat. 1887, Sec. 3198;
Rev. Stat. 1901, Sec. 4169;
Boquillas Cattle Co. v. Curtis, 213 U. S., 339.

At common law, all riparian proprietors have precisely the same rights to flowing waters, and no one could so use the stream as to interfere with its reasonable use by those above and below him. The right was in the current *(aqua currit, et*

debet currere ut currere solebat), which no one was at liberty to impair, either in quantity or quality. There was, consequently, no right to divert it for purposes of irrigation, especially in favor of one who was not a riparian proprietor.

3 Kent Comm., 439 ;
40 Cyc., 559 ;
New York City v. Pine, 185 U. S., 93, 96-7.

II. The Court below concluded that, by the abolition of ripraian rights, the plaintiff, as the first appropriator, had acquired the exclusive right to the use of the water, which could not be interfered with by the defendant (p. 69). In this conclusion, the Court erred, both in its understanding of the facts and of the law.

1. The Court found that " the mining industry and the farming industry * * * were commenced *about the same time* (1872) and have each grown and increased in importance to the present time " (p. 106). There is clearly no priority in this finding. While there is also a finding that the first concentrator was not erected for the reduction of ores until about 1885 (p. 109), this does not mean that ores were not reduced by crushing and mixing with water (the ordinary process, p. 108) prior to that date. There would obviously have been no reason for mining the ores prior to 1885, unless they could have been reduced and the metal extracted. The mere fact that an improved form of reduction or concentration may have been discovered would have no bearing upon the question of priority. Every industry is affected by the advance in the arts ; and while some of the steps taken may be greater than others, the industry itself dates from its initial stages.

Even if the doctrine of prior appropriation could be applied to partial stages of progress, the appellee would be in no better position. He has obtained a sweeping

injunction, because his 276 acres of land have been affected; but only *portions* of this land have been cultivated since 1872. It is only during the past fifteen years, or since about 1891, that the whole of the plaintiff's land has been under cultivation (p. 103). But the defendant's concentrator has been used since 1885 (p. 109). On the mere question of priority in time, therefore, the defendant is clearly first.

2. The Court also erred in its application of the law to its erroneous assumptions of fact. By Section 22 of the Bill of Rights (Political Code), no one could acquire an exclusive right to the use of any stream for the purpose of irrigation. All that a prior appropriator is entitled to, as against others, is a sufficient quantity of water to satisfy his appropriation, while its quality cannot be impaired so as to interfere seriously with the use to which it has been appropriated.

Kinney on Irrigation, Secs. 250, 251;
40 Cyc, 708, 713.

This is not essentially different from the principle recognized under the common law doctrine of riparian rights. A lower riparian owner cannot complain of the reasonable use of the stream, even if he is injured thereby.

Merrifield v. Worcester, 110 Mass., 216;
Hayes v. Waldron, 44 N. H., 580;
Strobel v. Kerr Salt Co., 164 N. Y., 303, 320;
Pennsylvania Coal Co. v. Sanderson, 113 Pa. St., 126, 146.

The difference is mainly in the extent of the use. As between two appropriators for irrigation purposes, the first in time might use all of the water of the stream, at certain seasons (Sec. 4191). But the principle of priority is not recognized as between an appropriator

for irrigation and a subsequent appropriator for mining purposes. This clearly appears from the statutory provisions set forth in the preceding Point (*ante*, pp. 9-11). The right to use a stream for mining purposes, including the reduction of metals, is made paramount.

Section 4178 expressly permits a mining company, in the reduction of its ores, to impede or obstruct the irrigation of any lands; and Section 4179 contemplates the physical seizure and possession of irrigated lands for reduction works or apparatus; and, by Section 4180, the only consequence of the appropriation by a mining company of water previously used for irrigation purposes, is to render the appropriator liable for damages; and this right of the mining company is further recognized in Section 4196.

III. In thus giving precedence to the mining industry, the Legislature merely recognized the well-known fact that the welfare of Arizona is peculiarly dependent upon the development of its mineral resources. The State has more ore and mineral bearing land than any other State of the Union. It now leads all the States in its copper output, contributing more than one-fourth of the entire copper production of the United States. The cultivation of the soil is a mere incident to the development of the mines. The entire area of the State is 113,956 square miles (72,932,840 acres), of which the farming area constitutes only about two per cent., while less than one per cent. is under cultivation. The population, in 1910, was about 204,000, or not equal to two-thirds of the population of the City of Washington; and the greater part of this population was undoubtedly supported by the mining industry, the defendant alone giving employment to about 3,000 men (p. 107), who, with their families, would, in themselves, represent a large community.

The rivers of Arizona, including particularly the Gila

River, run through mountainous territory (pp. 102, 106); and its arid plains probably gave the territory its Spanish name, signiyfying the arid zone; for the water surface constitutes less than one-tenth of one per cent. of the entire area, and the irrigated areas are mere specks upon the map.

In view of these conditions, it was inevitable that the Legislature should have expressly provided that the principal industry of the Territory should not be hampered by claims of prior rights on the part of farmers, and that it should have conferred on the mining companies a power substantially equivalent to that of eminent domain, and, in some respects, superior, in so far as it permitted the occupation of land before the assessment and payment of damages.

IV. It necessarily follows, that the only duty owing by a mining company to other users lower down the stream using the water for irrigating purposes, is to so conduct his business as not unnecessarily to interfere with the rights of such users; and this principle was recognized by the Court below (p. 69).

As heretofore stated, (*ante*, pp. 7, 8), it was not found, and not even alleged in the complaint, that the defendant could, by any reasonable precautions, have prevented the slimes and tailings from finding their way into the Gila River. On the contrary, the Court expressly found that it could not do so (p. 65).

THIRD.

Adequate remedy at law.

Even if it had been alleged and found that the defendant had operated its reduction works carelessly, the plaintiff had an adequate remedy at law for the damages sustained.

I. The public policy of the Territory is apparent in the express provision of the statute (Sec. 4179), that where, in the course of mining operations, the rights of one already using the public streams for irrigation purposes are invaded, his remedy is limited to a claim for the damages sustained, to be ascertained by arbitration or by a "*suit for damages.*" This is so, even where the mining company takes actual physical possession of part of the irrigated lands, as well as where the mining operations merely constitute an interference with the water employed in the irrigation (Sec. 4178). Thus, the Legislature carefully restricted the remedy in such cases, where the damages cannot be determined by agreement, to an action for damages.

The principle is the same as that involved in the exercise of the right of eminent domain. Under the policy of the law prevailing in Arizona, the appellee has no greater right to stop the operation of the appellant's works than he would have to enjoin the construction of a railroad, where the railroad company possessed the power of eminent domain. When that power exists, even though it has not been exercised, the courts will not grant an injunction, if the railroad company pays the damages assessed by the court.

Story v. N. Y. El. R. Co., 90 N. Y., 171, 179;
Am. Bank Note Co. v. N. Y. El. R. Co., 129 N. Y., 252, 270.

Indeed, even where the power of eminent domain does not exist, a court of equity has undoubted authority to take full possession of the controversy and end it, by requiring the payment of adequate compensation in lieu of the cessation of the trespass.

New York City v. Pine, 185 U. S., 93, 104.

II. There is no ground for claiming, as was done in the Court below, that, in the present case, the damages sustained cannot be estimated. The mere fact that it might be difficult

to assess the exact damages is no reason for granting an injunction. That is a difficulty inherent in the conditions existing in all cases where an action at law is brought to recover damages for an injury to property or for a breach of contract; but the mere existence of the difficulty is of no consequence.

Wakeman v. Wheeler & Wilson Co., 101 N. Y., 205, 209.

III. The court below expressly found, upon the "uncontradicted testimony," that it was practicable to construct and maintain, "*at moderate cost*," settling basins near the heads of the various canals, by means of which much of the sediment, including that from the defendant's works, might be prevented from entering the canals (p. 65); but it thought that "the farmers" (it lost sight of the plaintiff alone) should not be required to construct and maintain such basins (p. 75). If, however, this result could be attained by actually constructing such settling basins, obviously the damages could be estimated with absolute accuracy.

FOURTH.

No absolute injunction.

I. Even if it had been alleged and found that, by the employment of proper devices, the appellant could have prevented any injury to the plaintiff's land, the injunction should in no event have been broader than the injury shown to exist. But the Court below affirmed the judgment of the trial Court, which enjoined "any" slimes or tailings from reaching the River (p. 25), although it had expressly found, on the uncontradicted evidence, that it was *impossible* for the Company to

do this, and it recognized that the effect of the injunction would be to shut down absolutely its reduction works at Clifton (p. 65), the largest place in Graham County. It is no amelioration of the effect of this order, to permit the appellant to apply to the trial Court for a modification of the injunction, "upon a proper showing;" because, it is unreasonable to close the works completely when efforts are being honestly made to lessen the evil, and because under the decision below, no showing is possible that the appellant can exclude *all* waste material from reaching the water, while, in affirming the judgment, the Supreme Court held that this must be done.

II. In a suit in equity, the conditions existing at the time of the trial control.

Haffey v. Lynch, 143 N. Y., 241, 248;
Dieterich v. Fargo, 194 N. Y., 359, 363;
U. S. v. Trans-Missouri Freight Assn., 166 U. S., 290, 342.

The Court found that as soon as the plaintiff made any complaint to the defendant, the latter at once exerted itself to obviate the cause of the complaint and expended a large amount in doing so, with great success (p. 114). The inspector appointed by it reported that these efforts had been continued in good faith (pp. 97, 98, 99, 117). That is all that the Shannon Company has done or has agreed to do (p. 115). It is all that should be required of any one. If an injunction could be issued at all, why should not the plaintiff have been satisfied with one in the terms of the Shannon agreement? Can a principle be applied to an alien corporation different from that which the plaintiff himself recognizes to be applicable in the case of an American corporation?

In Georgia v. Tennessee Copper Co. (206 U. S., 230), this Court recognized the distinction existing between the case of a suit brought by a State and one brought by an individual, and the disposition to grant equitable relief in the former case but, in the latter, to leave the owner to his action at law (p. 238). Yet,

even in that case, it declined to grant the injunction until after a reasonable time had elapsed in which the defendants might be able to demonstrate the success of their efforts to lessen the effect of the fumes complained of (p. 239).

FIFTH.

No ground shown for any injunction.

I. If, as pointed out in the Third Point, the plaintiff had an adequate remedy at law, there was, of course, no ground for any injunction.

II. A permanent injunction will not be granted unless the evidence clearly establishes the invasion of the plaintiff's rights by the defendant, with a resulting *substantial* injury.

1. The injuries principally complained of in the complaint were, first, the deposit of sedimentary matter near the head of the canal, in such quantities as to raise its banks and thus interfere with the use of the water in the canal, and, second, the covering of the plants with the sediment. This, however, cannot be attributed to the slimes and tailings from the appellant's works, as the Court found that in the large amount of sedimentary matter (principally the result of erosion, carried down by the floods, the slimes and tailings, even though including those from the works of other companies, were a negligible quantity (p. 109). The sole remaining ground of complaint, that the sediment formed a compact layer over the soil not readily permeable by water, was also due to the quantity of sediment as well as to the slimes and tailings from the works of the appellant and other

mining companies; and the court found that this could be largely overcome by plowing and harrowing (p. 112).

2. The explicit finding of the court, that, during the last five years, the lands of the plaintiff have greatly increased in market value, including the portion devoted to the cultivation of alfalfa (p. 116), is absolutely inconsistent with the possibility of any substantial damage to the plaintiff's land. The damage that seemed to have influenced the Court below was the supposed damage to the community at large and not any damage actually sustained by the plaintiff.

3. There is no finding that any appreciable injury to the plaintiff's land was caused by the defendant alone. Throughout his sworn complaint, the plaintiff has declared that the acts complained of were committed by all of the defendants. Any injury was, therefore, only in part due to the defendant; and the findings of the Court emphasize this (pp. 106-7, 112-13). But, under the judgment entered, the defendant's works must be closed and remain closed so long as *any* waste matter, from *any* concentrator, whether operated by the defendant or not, finds its way upon the plaintiff's land; because, the deposit of *all* such matter has been attributed to this appellant by the lower courts, notwithstanding the express allegation in the complaint and the express finding by the Court that other mining companies, as well as the defendant, and also the forces of nature, have contributed to the result. Under such circumstances, an injunction will be denied; because it would not materially improve the plaintiff's condition.

Wood v. Sutcliffe, 3 Simons (N. R.), 163.

III. An injunction will not be granted where the injuries to the plaintiff are slight and where the consequences of

the injunction to the defendant and others may be very injurious.

1 Spelling on Injunctions, Sec. 417;
Powell v. B. & G. Furniture Co., 34 W. Va., 804;
Clifton Iron Co. v. Dye, 87 Ala., 468;
Madison v. Ducktown etc. R. Co., 113 Tenn., 331;
McClure v. Leaycraft, 183 N. Y., 36, 44.

No case could furnish a more striking illustration of this proposition than the case at bar.

1. The damage sustained by the plaintiff from all the sedimentary matter carried down the river was not sufficient to prevent a great increase in the market value of his land; and as the slime and tailings from reduction works on the upper streams constituted a negligible part of all this sediment, and as there are other tensive works than the appellant's in operation, it is obvious that any damages sustained from the appellant's waste matter was infinitesimal.

2. On the other hand, the disastrous consequences to the defendant of an injunction is expressly recognized by the Court below, in the shutting down of at least one of its concentrators (p. 65). The total valuation of all property in Arizona, in 1906, was only $62,227,633. The appellant alone has expended in the development of its business $15,000,000 (p. 107). Clifton, without the business of the appellant, would rapidly dwindle and disappear from the map, after the manner of mining towns where the mines have been exhausted.

IV. Equity regards relative values. The sense of proportion and relativity is uppermost in the application of equitable principles. "Such an emission of smoke as would constitute a nuisance in the City of New York might afford no just

ground of complaint in Pittsburgh" (Bates v. Holbrook, 171 N. Y., 460, 475). But the Court below decided this case as strictly as if it had been an action at law. It would have rendered the same decision, had it applied the law as rigidly, if the plaintiff had been merely cultivating his private vegetable garden.

V. In the contemplation of personal rights, equity will not lose sight of the public interest. A court of equity is never active in granting relief against public convenience merely for the purpose of protecting a technical legal right.

Smith v. Clay, 3 Browns, Ch., 639, note;
Knoth v. Manhattan Ry. Co., 187 N. Y., 243;
New York City v. Pine, 185 U. S., 93, 99.

If the judgment in this case is sustained, a precedent will be established that will inevitably affect the entire mining industry of Arizona, for it is impossible to conduct mining operations without the use of water in the reduction of the ores, and it is also impossible, according to the finding of the Court, to reduce the ores without permitting some of the tailings to reach the streams (p. 65); and it is inconceivable that there will not be other farmers, with alleged prior water rights, who will be able to show at least as much injury as the plaintiff has shown in the present case, resulting from the operation of reduction works by this defendant and other mining companies. It would take but few such actions to put an end to all mining operations in Arizona. No such disastrous consequences should be permitted upon the vague claims and surmises upon which the judgment appealed from is based, especially in view of the clear public policy of the State to foster and protect its paramount industry. To permit the plaintiff to refuse to accept a sum representing the damages actually sustained or likely to be sustained by him, and insist upon an unconditional injunction which will result in obstructing and possibly terminating a

great industry, would be to furnish him, in the language of this Court, with "a club to compel payment of the sum he deems the measure of his damages".

New York City v. Pine, 185 U. S., 93, 97.

SIXTH.

The judgment of the Supreme Court of the Territory should be reversed and the complaint should be dismissed.

Washington, January, 1913.

JOHN A. GARVER,
WALTER BENNETT,
Counsel for Appellant.

INDEX.

TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 106

ARIZONA COPPER COMPANY, Limited, *Appellant*,

vs.

WILLIAM ALLEN GILLESPIE, *Appellee*.

BRIEF IN BEHALF OF APPELLEE.

1.

STATEMENT OF THE CASE.

This appeal presents for review a judgment enjoining the appellant mining company from depositing tailings and slickens in the waters of the Gila River, with authority vested in the trial court to enforce or modify the injunction in accordance with the conditions as they may exist from time to time. The judgment of the trial court is found upon pages 13-14 of the transcript of the record; the modification of this judgment is ordered in the opinion of the Supreme Court of Arizona found at page 41 of the transcript and the judgment of the Supreme Court of Arizona is found at pages 41 and 42 of the transcript.

The facts upon which the judgment is based as shown by the evidence are practically undisputed. The Gila River, one of the principal rivers of Arizona, and a non-navigable stream, traverses the State in an easterly and westerly direction and has amongst its tributaries the San Francisco

River and Chase Creek. Chase Creek enters the San Francisco River at the town of Clifton and the San Francisco River flows into the Gila River some twenty to twenty-five miles above the town of Solomonville. Clifton, the center of the mining district affected, is situated in a mountainous country where are found immense deposits of copper being worked by the Detroit Copper Company, Shannon Copper Company and the Arizona Copper Company, Limited. This mining industry supports the towns of Morenci, Metcalf and Clifton, in all a population of from fifteen to eighteen thousand people.

The first mining operations were commenced about 1872, but nothing of consequence in the reduction of ores was undertaken until about the years 1885 and 1886, at which time a small concentrating plant was built by the appellant, the Arizona Copper Company, Limited, upon the San Francisco River at Clifton. Later and with the increase of operations this plant was greatly enlarged until at the time of the filing of the complaint it had a daily capacity of 700 or 800 tons. Other plants were later erected by the appellant. Concentrator No. 5, called the "Longfellow," was located upon a canyon debouching into Chase Creek, with the same capacity, and was erected about 1901. The No. 6 concentrator was erected by the appellant upon the Morenci canyon emptying into the San Francisco River. It was placed in operation about 1906 and had a capacity at the time of the trial of about 900 tons a day.

In these concentrators the mineral bearing rocks are reduced to a coarse powder, in which process a large portion is reduced to a more highly divided state. The mineralized elements which constitute but a small portion are separated from the residue, the coarser particles of which are spoken of as tailings, and the finer particles as slickens or slimes. The concentrator at Clifton is located directly upon the San Francisco River. A large portion of the tailings from this concentrator is used as ballast upon the company's railroad, and the finer tailings and slimes were at the time of trial run directly into the San Francisco River. The tailings from the other two concentrators are mixed with enough water to carry them down the canyons in cool weather. In the summer months the evaporation of the water is

such that a portion of these tailings are piled up in the canyon, and only such portion as the water is able to move reach the river. At the time of the trial, in the canyon leading down from the Longfellow concentrator, tailings had settled two to four feet deep in some of the curves of the creek. The deposit from the concentrator at Clifton at times before the issuance of the injunction herein formed a dam across the river, impounding waters in the stream and forming a lake. Formerly there was a travelled road along the river which was abandoned because it became so boggy from tailings.

The farm of Mr. Gillespie, the appellee herein, lies in the upper Gila valley in a strip of farming country on both sides of the Gila River. This farming district extends from a point some five miles above the town of Solomonville to about twenty-five miles below. There are some twenty-three thousand acres of land in cultivation irrigated from the Gila River. It lies in an arid region where it is impossible to successfully cultivate land without irrigation.

This district supports three towns and some villages, in all a community of approximately 10,000 people. Farming was first commenced in 1872, about the same time as the first mining operations about Clifton. The appellee has some 275 acres of land under cultivation under the Montezuma canal, and water for his land was first appropriated in that year.

Some five or six years before the trial, and about the year 1901, with the increasing reduction of ores in the Clifton mills, tailings and slimes were first noticed by the farmers at the heads of their canals. From that time to the granting of the injunction herein there was a continuous deposit of these tailings upon the lands throughout the farming district. By reason of these deposits the alfalfa crop, which is the principal staple raised in the valley, has been diminished one-third. The appellee estimated that his total damage caused by the tailings in the past five years had been in excess of $10,000.00, and that the year preceding the suit his loss had been $2,000.00.

The effect of the deposit of tailings and slimes upon the soil of the Upper Gila Valley was studied by Mr. R. H.

Forbes, Director of the Agricultural Experiment Station of the University of Arizona in connection with his general study of the effect of deposits upon soils of the various irrigating sections of the State. The period of observation extended over a number of years. Mr. Forbes was the only expert witness called upon either side. He was placed upon the stand by the appellant, and the result of his observations are to be found in Bulletin No. 53 University of Arizona Experiment Station "Irrigating Sediments and their Effect upon the Crops." This bulletin was introduced by the mining company without objection from the appellee. Prof. Forbes in this bulletin thus describes the effect of these tailings upon the soil:

> "This fine, detrital material, consisting in large part of decomposed, kaolinized porphyry, has a chemical composition approaching that of clay. Being notably plastic in character, it forms an exceptionally impervious blanket, so effective, that at the heads of fields, even immediately after irrigation, the soil within the second six inches from the surface has in some instances been observed in a dust-dry condition; while at the lower ends of the same fields, with but little accumulation, the same irrigation has penetrated several feet.
>
> "Being thus partly shut away from the water supply the roots of alfalfa fail to support vigorous growth, the tops are stunted, bloom prematurely, and sometimes wither before normal growth is ready for cutting. The ground under this scant covering being comparatively unshaded and therefore exposed to wind and sun, dries and cracks in hot weather, thus involving the soil and the crop in a destructive sequence of bad conditions, so that, notwithstanding the application of irrigating water, the crop actually suffers from drought.
>
> "These sediments are from various sources, but for the last few years * * * and with the increasing operations at the mines, are evidently chiefly from the San Francisco, into which, from the Clifton-Morenci District, large quantities of tailings from copper ore are discharged by the mills into the river. The finer

portions of this waste material are in most minutely divided condition, and are, therefore, carried by the water as long as it has motion, being finally deposited only when it sinks into the soil in irrigated fields.

"Although ordinarily, the percentages of these tailings sediments in irrigating waters containing them are comparatively small, yet they are constantly present, since the mills contributing them rarely stop operations. There is, therefore, no escape from them * * and slow, ceaseless accumulations consequently gain in depth year by year until the effects, especially upon alfalfa, have become evident * * ."

The Professor summarizes his observations as follows:

"Irrigating sediments may be beneficial or harmful to crops according to their composition and physical character, and their disposition in or upon the soil. Whether beneficial or harmful in composition, if they accumulate upon the surface of the soil in the form of silt-blankets more or less impervious to water and air, their influence, by limiting the supply of these essential substances to plant roots, is notably harmful. In certain localities where these irrigating sediments are very plastic in character and excessive in amount the damage, particularly to alfalfa and other crops which cannot receive constant and thorough cultivation, is of an increasingly serious character.

"Cultivation, where practicable, as deep and thorough as possible, is the best available means of handling these accumulations. Beneficial sediments are thus incorporated with the soil and their fertilizing properties made available to plant roots; while sediments of barren character are dispersed to the depth of cultivation through the soil. When, however, sediments of undesirable character predominate, cultivation can only modify and not remedy resulting conditions.

"Mining detritus in the instances observed, is nearly or quite devoid of nitrogen and organic matter, most required by desert soils, and is probably without ferti-

lizing value. The plastic character of this mining detritus, and the excessive amounts in which it accumulates upon certain alfalfa lands result in an extreme instance of deterioration in yield due to irrigating sediments."

The trial judge, Hon. Frederick S. Nave, made a personal inspection of the farm of Mr. Gillespie during the course of the trial. The findings of fact signed by the trial judge are omitted by direction of the attorneys for appellant (page 13, Transcript of Record) but are fully set forth in the opinion of the Supreme Court of Arizona on page 31 *et seq.* The results of his personal observation, as well as his conclusions from the evidence are embodied in these findings, particularly at pages 33 to 35 of the Transcript of Record.

The record discloses that prior to the institution of this action the Detroit Copper Company and the Shannon Copper Company were contributing factors in the injury complained of by the appellee. The Detroit Copper Company had, at the complaint of the farmers of the Upper Gila Valley, taken effective means to prevent the tailings from their plant reaching the irrigating waters of the Gila River. The Shannon Copper Company was made a party to the action, but shortly before the trial the Shannon Copper Company entered into an agreement to keep its tailings out of the stream. Hence the action was dismissed as against the Shannon Copper Company. The memorandum of agreement between the Shannon Copper Company and William Allen Gillespie and others is omitted from the record by direction of the attorneys for the appellant (page 13, Transcript of Record). The reason for the dismissal as to the Shannon Copper Company is found in the statement of facts by the Supreme Court of Arizona (page 59, Transcript of Record). The case was dismissed as against the Arizona Copper Company, it appearing that this company was a holding company. The injunction was entered against the Arizona Copper Company, Limited, alone, which is the operating company and the appellant herein.

This judgment was rendered the 5th day of November, 1907, with a proviso that it should not become operative

until May 1, 1908, in order to permit the Arizona Copper Company, Limited, to make arrangements for caring for its tailings without shutting down its plants. In March, 1908, the mining company applied to the Supreme Court of Arizona for an order suspending the judgment upon a showing that it was using diligent efforts to decrease the amount of waste material finding its way into the Gila River, but was not in all respects able to comply with the injunction. An order suspending the judgment pending the appeal was made March 27, 1908. (Order suspending judgment page 27, Transcript of Record). The opinion of the Supreme Court upon the appeal was handed down March 20, 1909, wherein the judgment of the trial court was modified, vesting in the trial court authority to enforce or modify the injunction in accordance with the conditions as they should be found to be. The injunction was further suspended until the November 8, 1909 session of the court (page 44, Transcript of Record). Upon the appeal to the Supreme Court of the United States being perfected, the mining company asked a further suspension of the injunction (page 46, Transcript of Record), which suspension was ordered upon the terms and conditions found in the order (pages 47 and 48 of the Transcript). Under the order of the court Richard Layton was appointed for the purpose of inspecting and reporting to the court the condition of such impounding works. Three of his reports are printed upon page 51 of the Transcript of Record. From the fact that no further reports are printed, although this officer has made these reports monthly since that time, we assume that the reports printed include all those made before the transcript of the record was ordered by the appellant.

II.

BRIEF OF ARGUMENT.

A. *The denial of the motion to strike certain portions of plaintiffs complaint was proper, inasmuch as plaintiffs complaint was that of a private individual suffering special injury suing to enjoin a public nuisance.*

The first assignment of error (page 52, Transcript of Record) urges error in the denial of the appellant's motion

to strike certain portions of the complaint pointed out in the motion (page 13, Transcript of Record). We assume that this error is assigned here, as it was in the Supreme Court of Arizona and as originally made in the trial court, to place the appellee on record as to the theory of his action. The theory of the complaint is that the plaintiff as a private individual suffering special injury from a public nuisance is entitled to injunctive relief against such nuisance. Such being the theory of the complaint, the propriety of the allegations sought to be stricken is elementary.

This assignment, although not considered by the Supreme Court of Arizona, was not called to that court's attention by appellant's motion for rehearing (page 42, Transcript of Record) and we feel justified in treating the assignment as purely formal.

B. *The facts stated in the complaint constitute a cause of action.*

The second assignment of error alleges error in the overruling of the demurrer to the complaint. The demurrer argued below and ruled upon was appellant's general demurrer. We shall therefore follow the line of former argument.

The complaint, after setting forth the corporate existence of the several defendants, describes the Gila River and its affluents, the San Francisco River and Chase Creek, and alleges the public nature of the streams and pure character of water prior to the commission of the acts of the defendants complained of. It further sets forth the description of plaintiff's premises; the appropriation of water from the Gila River in 1872 therefor, and its continuous use since. Paragraph 4 describes the Montezuma Canal, through which the plaintiff obtains his water, which supplies some 3750 acres of land. Paragraph 5 describes the Upper Gila Valley, where some 23,000 acres of land are farmed by means of irrigation waters diverted from the Gila River, supporting several towns; in all a community of more than eight thousand people. Paragraph 6 describes the mining operations of the defendants and alleges that they treat

more than 100,000 tons of copper ore each month, the waste from which, consisting of finely pulverized rock and slimes and sediments, is allowed to flow into the streams and thence carried to the lands of plaintiff and others like situate. Paragraph 7 alleges that the tailings from the several mills of the several defendants become commingled and indistinguishable, and that all of the defendants contribute to the injury complained of by the plaintiff. Paragraph 8 alleges that the appropriation made by the defendants for milling purposes and the erection of their mills was later in point of time than the appropriation by the plaintiff. Paragraph 9 sets forth the extent to which Chase Creek, the San Francisco River and the Gila River have been filled with slimes and that these slimes and tailings are carried down upon the lands of the plaintiff to their injury and that the damage is increasing and unless restrained by the court the lands of the plaintiff will be wholly destroyed. Paragraph 10 sets forth the poisonous nature of the substances deposited in the Gila River. Paragraph 11 describes in detail the injury to plaintiff's land, alleging that the waters appropriated by plaintiff were at all times fouled by the finer tailings and that they are carried out on the lands of plaintiff, covering the soil with a coating of inert matter, impervious to air and not readily soluble in water, which destroys the crops growing thereon, and decreases the fertility thereof to the great and increasing injury of plaintiff. Paragraph 12 alleges that the injury to plaintiff's land is continuous and increasing, and that plaintiff has no adequate remedy at law, and that the defendants threaten to, and will, unless restrained by the order of the court, continue to deposit and increase the deposit of tailings, to the damage of plaintiff.

The prayer is that an injunction issue to the defendants perpetually restraining them from depositing in the waters of the Gila River slimes and tailings, and for other and further relief.

The complaint is found at pages 1 to 8 of the Transcript of Record.

The only contention urged by the appellant below in support of the demurrer was that this being concededly an

action by a private individual to enjoin a public nuisance, plaintiff had failed to allege facts showing that he suffered a special injury differing not only in degree but in kind from that suffered by the public as to whom that nuisance existed.

The appellant is insistent that not only must special injury be shown, but such injury must differ in kind from that suffered by the public before the plaintiff may maintain his action. As pointed out by the Arizona court (Opinion at page 37, Transcript of Record) these are the words in which the rule is stated by most of the state courts. The rule as laid down by this court in the case of Georgetown vs. Alexandria Canal Company, 12 Peters, 91, is in simpler language: "The principle then is, that in case of a public nuisance where a bill is filed by a private person, asking for relief by way of prevention, the plaintiff cannot maintain a stand in a court of equity, unless he avers and proves some special injury."

In Mississippi and Missouri R. R. Co. vs. Ward, 2 Black, 485, it is said: "A bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in England of an information in Chancery, prosecuted on behalf of the Crown, to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining individual damage, he cannot be heard. He seeks redress of a continuous trespass and wrong against himself, and acts in behalf of all others, who are or may be injured."

Without stopping to discuss the proper phrasing of the rule, but accepting the statement of the rule as laid down by the state courts, it is a simple matter to demonstrate that the plaintiff shows a special injury differing in kind from that suffered by the general public.

The public, which has the right to have the Gila River flow in its unpolluted state, consists of many classes: the merchant, the banker, the doctor, the stock grower, the farmer, of which latter class is the plaintiff. All classes would suffer if the prosperity of the community is dimin-

ished by reason of the acts of the mining company complained of. The doctor, the banker, the merchant, has no property right in the waters of the Gila River. The farmer, and particularly the appellee, who has, under the laws of the state, appropriated water for the irrigation of his farm, has a property right in the waters of the Gila River. That right is an appurtenance to his land. The acts of the appellant are a direct invasion of his right of property. The injury which he suffers is the direct result of such acts. His injury is special and differs in kind from that of the other classes of the community who suffer generally and remotely from the same acts.

> "This class of wrong of different nature and effect that invades private rights as well as public, always has been and always can be redressed by suits in favor of those whose private rights are invaded, even though it opens the door for a multitude of actions for the same wrongful act. The distinction is this: Where a private personal right is invaded, the very fact of its invasion imports a consequent damage. * * therefore any injury to such private rights even though its effects are so general as to bring it within the rule as to public nuisances is such special and peculiar damage as brings it within the beneficial operation of the rule in reference to suits for injury arising from public nuisances."

Wood on Nuisances, Section 689.

The appellee has demonstrated the sufficiency of the complaint as alleging a special injury different in kind from that suffered by the public generally. It moved to strike from the complaint all the facts alleged therein tending to show that the acts complained of were a public nuisance. With these allegations stricken from the complaint, it was conceded on the argument of the demurrer that the complaint even then stated a good cause of action. As the trial court remarked, the complaint stripped of its allegations with respect to the public nature of the nuisance would yet constitute a good cause of action for an injunction, based

upon the recurrent trespasses committed by the defendant upon the plaintiff's property, which trespasses were continuing in their nature and not susceptible of recompense in an action for damages at law.

No such allegations will be found in that class of cases where the court has refused injunctive relief to a private party upon a complaint against a public nuisance. In those cases, when they are analyzed, it will be seen that the complaint is for the deprivation of a right common to the public and not an injury to private property. In this case upon the arguments of the motions to strike, it was urged that the complaint which tended to characterize the acts of the defendants as a public nuisance, that such allegations were mere makeweight. This the plaintiff did not and does not concede. He contends that he has the right to preclude the defendant from urging any defenses which might be valid as against a purely private trespass by setting forth and proving the public nature of the injury complained of and showing that as a direct consequence of the same cause which constituted a nuisance as to the public he has suffered a purely private injury special to himself, different in kind from that suffered by the public, and an invasion of his purely private right of property.

C. *The plaintiff is entitled to the injunctive relief granted.*

The third and fourth assignments of error raise generally the question of the correctness of the judgment of the Supreme Court of Arizona.

It is difficult to determine from these assignments what line of argument is to be presented in appellant's brief. We shall therefore set forth our contention and answer several of the arguments advanced by the appellant in the court below, believing that the argument here will be along the same general lines.

A reading of the facts as found by the Supreme Court of Arizona and certified to this court (p. 53, Transcript of Record) shows that in all essential particulars the proofs offered sustained the allegations of the complaint. The de-

fendant company concentrating three thousand tons of mineral bearing rock each day was, prior to the institution of this suit, allowing the tailings from its mills to flow directly and indirectly into the irrigation waters which were the sole means of cultivating thousands of acres of farming land in the Gila Valley. A large portion of these tailings were, in the normal course of irrigation, deposited upon the lands of the appellee and other lands described in the complaint. They were first noticed upon the farming lands some six or eight years before the commencement of the suit, and the quantity of such slimes, slickens and tailings so deposited continuously increased until after the institution of the suit. These slimes and tailings so carried upon the lands of the appellee consist of finely pulverized rock, are inert, and contain nothing of fertilizing value to the lands of the appellee. They injuriously affect the cultivated lands for the purposes of raising crops in that they become deposited upon the surface in constantly increasing depth, being deposited to a greater depth near the points at which the water is applied to the land for the purposes of irrigation and become progressively thinner as the water passes over the said lands farther from the points of immediate diversion and application. The injurious effect upon the land and crops is largely mechanical by elevating the land adjoining the point of immediate application of the water, thus compelling the taking of the water supply at increasingly higher water levels; second, in that the deposits form a compact layer over the soil not readily permeable by water, thus depriving the roots of the plants of appropriate and necessary irrigation; and third, in that they pack about the crowns and stems of the growing plants, thus choking and burying them, seriously injuring their growth and productiveness. That during the major portion of the year the Gila River, prior to the deposit of tailings therein, flowed clear and at such times, being normally the periods of low water in said river, there is greatest need of irrigation. For a period of a year or two prior to the institution of this suit the waters carried such great volumes of slimes and tailings that layers unmixed with other substances were deposited in some of the irrigating ditches more directly affected thereby and on the soil near the

points of immediate application of water of a thickness of half an inch or more. That the appellee was injured in the loss of productivity of his fields of alfalfa in the year preceding the filing of this suit by reason of these deposits in an amount which the court was unable to exactly determine, in excess of one thousand dollars, and that from the said cause crops of alfalfa grown upon other cultivated lands mentioned, were damaged to the amount of many thousands of dollars. That the injuries complained of are continuous and constantly increasing.

The propositions of law upon which the appellee has based his case are these:

(a) Pollution of irrigating streams by mine tailings is a nuisance and becomes a public nuisance when the injury and inconvenience therefrom becomes general in its effect upon a community.

(b) It may be enjoined at the suit of a private individual who suffers a special injury therefrom.

A. *Pollution of an irrigation stream by mining tailings is a nuisance and becomes a public nuisance when the injury and inconvenience therefrom becomes general in its effect upon a commnnity.*

Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 753.

McCarthy v. Gaston Ridge, etc., Co., 144 Cal. 542, 78 Pac. 7.

Chessman v. Hale, 31 Mont. 577; 79 Pac. 254; 68 L. R. A. 410.

Weil, Water Rights in Western States, Secs. 524-528.

The doctrine of riparian rights does not prevail in Arizona. Nevertheless, the rule as adopted in arid regions of the United States against the pollution of waters of irrigation streams is even more strict than that of the eastern portion of the United States where mining is practiced and riparian rights obtain.

Suffolk G. M. & M. Co. vs. San Miguel M. & M. Co., 9 Colo. App. 407; 48 Pac. 828.

Humphreys Tunnel & Min. Co. vs. Frank, 46 Colo. 524, 105 Pac. 1093.

The rule may be fairly stated in these words:

That each user of water is entitled to such use thereof as is indispensible for the purpose for which he has appropriated the water, but in making such use he may not pollute or deteriorate that which he does not use to the injury of prior appropriators.

Weil, Water Rights in the Western States, Par. 524.

It is true that the opinion in one of the early California cases, an action between mining companies, states that deterioration of the water supply resulting from mining operations is an injury without damage.

Bear River, etc., Co. v. New York Mining Co., 8 Cal. 327.

But in case of Pilot Rock Creek Canal Co. v. Chapman, 11 Cal. 161, the Court said:

> "It has nowhere been held that a defendant is not responsible for injuries done the ditch of another by the deposit of mud and sediment in it. The doctrine of the Bear River Co. v. New York Mining Co., 8 Cal. 327, probably went quite as far as it ought to have gone, when confined to the express points there announced, and we certainly feel no disposition to extend it further."

Again in the case of Hill v. Smith, 27 Cal. 476, the Court says:

> "The maxim, *sic utere tuo ut alienum non laedas,* * * has lost none of its governing force; on the contrary, it remains now, and in the mining regions of this State, as operative a test of the unlawful use of water as at any time in the past, or in any other coun-

try * * . Yet the maxim above mentioned upon which the rule is founded is equally applicable to the ditch owner and to the miner as to the riparian proprietor, and neither can so use the water as to injure or prejudice the prior rights to a like use by the other.

"No person, natural or artificial, has a right directly or indirectly, to cover his neighbors land with mining debris, sand or gravel, or other material so as to render it valueless."

Hobbs vs. Canal Co., 66 Cal. 161; 4 Pac. 1147.

"A subsequent appropriator of water from a natural stream has no right to destroy the ditch of a prior appropriator or to materially diminish the quantity or deteriorate the quality of water to which the latter is entitled."

Junkans vs. Bergin, 67 Cal. 267.

"A placer miner has a right to deposit tailings in the running stream to a reasonable extent but not the right of depositing tailings or debris on the land of one below so as to substantially injure and ruin the same, and the rule is not changed by the fact that the mining operation could not be successfully carried on without inflicting the injury."

Fitzpatrick vs. Montgomery, 20 Mont. 181, 50 Pac. 416.

Says Mr. Justice Field in the case of Atchison v. Peterson, 87 U. S. 507 (20 Wallace), 22 Law. Ed. 414 at 417:

"What diminution of quantity, or deterioration in quality will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all contro-

versies, therefore, between him and the parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant."

"In any case deterioration in the quality of water so as to render it less fit for the first appropriator gives him a right to complain."

Crane vs. Winsor, 2 Utah 248.

(b). *A public nuisance by the pollution of an irrigation stream may be enjoined at the suit of a private individual who suffers a special injury therefrom.*

This proposition has been fully argued heretofore upon the second assignment of error raising the question of the sufficiency of the complaint as against general demurrer. That the facts proven suffice to bring the case within the rule is demonstrated by the findings upon which the case is certified here. These findings show that every essential allegation of the complaint was established upon the trial.

The three contentions which were urged in the court below against the granting of injunctive relief and which will doubtless be urged by the appellant in this court were:

(1). That mining companies conducting operations without negligence in the usual and customary manner and using all reasonable efforts to prevent injury to the agricultural interests of the valley are not liable for the resultant damage.

(2). That inasmuch as the company showed that at the time of the trial it had by its efforts largely minimized the injury to the appellee by the construction of works which in large part prevented the tailings from reaching the irrigation waters, the injunction should not be granted.

(3). That inasmuch as to enjoin the deposit of tailings in the stream would result in the closing down of the plants

of the appellant company, throwing thousands of people out of work, the injunction should be refused in the interest of the public under the doctrine of comparative hardship.

(1). *Mining companies conducting operations without negligence in the usual and customary manner and using all reasonable efforts to prevent injury to the agricultural interests of the valley are not liable for the resultant damage.*

As a statement of law, we believe this contention of the appellant unsound. The only cases cited by the appellant below in support of this doctrine were:

Barnard vs. Shirley, 135 Ind. 547-555; 24 L. R. A. 568
Same Case on rehearing, 41 L. R. A. 737.
The concurring opinion of Judge Ailshie in
Hill vs. Standard Mining Co., 12 Idaho, 223; 85 Pac. 907, and
McCarthy vs. Bunker Hill and Sullivan Min. Co., 147 Fed. 981.

These cases are so readily distinguishable from the case at bar upon the facts that an extended review of them is unwarranted. It is enough to point out that in each of the cases the court proceeded upon the assumption of an absolute necessity for the fouling of the waters. No case has been cited, nor have we found a case that states the rule in the broad terms quoted above. Any statement we have found of any form of this rule when read in the light of the facts of the case is limited by an additional element, viz: An absolute inability to conduct mining operations without pollution of the stream. As we have repeatedly pointed out, no such element exists in this case.

In the court below counsel for the appellant in their brief in urging the right of defendant to a reasonable use of the stream for purposes of mining, quote Lindley on Mines, Section 841, 2nd Edition. In this same work, Mr. Lindley (Sec. 840) reviews at length the leading case of Pennsylvania Coal Co. vs. Sanderson, 113 Pa. St. 126, 57 American Cases 445, 6 Atlantic 453, which case finally held

the right of a miner to pollute a stream by draining percolating waters therein where it was the result of the operation of mining in the ordinary and usual manner. The learned author says, in commenting upon the case (page 1519):

> "It must be candidly conceded that the reasoning of these later opinions of the Pennsylvania court goes beyond that on any other case previously found in the books. They announce a doctrine which might become extremely dangerous if generally accepted. The Supreme Court of Indiana has, however, expressly adopted the doctrine in question in Barnard v. Shirley, (Cited by appellant) and it has been in that state applied in several later cases. Their correctness has been denied by the Supreme Court of Errors of Connecticut, which said of them: 'We do not find other cases which take this extreme ground. The Pennsylvania court itself has in subsequent cases been careful to limit the application of the principles lastly announced, * * and has declined to extend it to instances where material was brought to the ground and artificially treated, the refuse and waste being discharged into the streams, and it may be plausibly asserted that these latter cases weaken the force of the rule finally announced in the Sanderson case.' "

The Supreme Court of Pennsylvania in a recent case involving restraining the reduction of ores where reduction caused a public nuisance, speaking of the Sanderson case, says:

> "The changed conditions brought about by the appellee have not resulted from the development and natural use and enjoyment of its own property, as was the situation in Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 5 Atl. 453, 57 Am. Rep. 445, the doctrine of which case has never been, and never ought to be, extended beyond the limitations put upon it by its own facts. There it was said of the coal company: 'They have brought nothing onto the land artificially. The water as it is poured into Meadow Brook is the water

which the mine naturally discharges; its impurity arises from natural, not artificial causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it.' Here the furnaces were artificially brought by the appellee onto its lands by being built there by it, and the Mesaba ore converted by the furnaces into iron is also artificially brought there by it."

Sullivan v. Jones & Laughlin Steel Co., 208 Pa. St. 540, 57 Atl. 1065 at 1068, 66 L. R. A. 712.

We believe that the Supreme Court of Arizona has gone as far as the law warrants in saying in this case (Opinion page 38, Transcript of Record): "We do not mean to say that the agriculturist may captiously complain of a reasonable use of water by the miner up the stream, although it pollutes and makes the water slightly less desirable, nor that a court of equity should interfere with mining industries because they cause slight inconveniences or occasional annoyances, or even some degree of interference, so long as such do no substantial damage, but to permit a subsequent appropriator to so pollute or burden the stream with debris as substantially to render it less available to the prior appropriator causes him to lose the rights he gained by appropriation as readily as would the diversion of a portion of the water which he appropriated."

Whether this rule of ordinary care and custom proposed by appellant is sound as a proposition of law makes but little difference so far as the determination of this case is concerned. The conduct by the mining company of its business clearly shows that it cannot bring itself within the rule it proposes. Prior to the institution of the suit, no effort was made to prevent its tailings from reaching the irrigation waters. All three of the company's mills were contributing to the pollution of the stream. After the institution of the suit, by the exercise of ordinary care and an expenditure of fifty thousand dollars, which is trivial as compared with its enormous investment of fifteen millions

of dollars, it stopped the tailings from its concentrators No. 5 and No. 6.

Mr. Olney, one of the witnesses for the farmers, testified as to the conditions when the suit was brought:

> "Mr. Dysart and I went to Clifton to look the situation over last September and to see for ourselves whether or not the tailings were running into the river from the concentrators. * * At that time I went up to the Detroit Copper Company's dam. I could not find that there were any tailings coming from that dam at that time. Tailings were coming from all the plants of the Arizona Copper Company."

Mr. Olney repeated his conversation with Mr. Colquhoun the superintendent:

> "I had a conversation with Mr. Colquhoun in regard to the discharge of tailings from the Clifton mill. He said they were not doing anything to keep the slimes out of the river. He said they had not yet devised a scheme or way by which they thought they could take care of the slimes."

Professor Forbes in his Bulletin No. 53, pages 90 to 93, in evidence, states the condition of the Detroit and Shannon plants June 1906:

> "In many cases, however, dams must be constructed to slacken stream-flow and precipitate sediments. Dams of various sizes and materials may be observed along the Gila where, for industrial reasons, the necessity for them is greater.
>
> "Most notable of these structures are the dams built by the mining companies near Clifton and Morenci, Arizona, across the deep narrow gulches in which this district abounds. Waste materials from the mines are employed in the construction of these dams. The Detroit Copper Company, below one of its mills near Morenci, utilizes the coarser detritus or tailings from its

sulphide ores. These tailings are deposited across the narrow, rocky gulch below the mill by means of a launder of sufficient incline to carry the material. The dam is strengthened by sheets of corrugated roofing built into the upstream side, and by a wing dam so placed as to support the downstream side. With one man to direct the course of the mixed stream of water and tailings, a bank or dam of loose material whose greatest height is not less than 60 feet (June, 1906), has been constructed, behind which lies a reservoir approximately 200 yards long, of very irregular shape and several million (not estimated) cubic feet capacity. The material of this dam being too soft to stand overflow, the pond is drained by means of lumber wells at the lower end, connecting with a flume running out under the dam. The level of discharge is regulated by holes and stoppers in the lumber well. The efficiency of this plant may be judged by the fact that, June 26, 1906, with a stated discharge of 350 gallons a minute of slimes and sands into the upper end of the reservoir, carrying the larger part of 800 tons per day of solids, the well and flume were delivering perfectly clear water at the outlet beyond the dam. At the time of observation, the existing reservoir was probably more than half full of slimes, being stated to have received an average output from the mill of 18,000 to 24,000 tons of tailings a month for a period of about 22 months.

"Molten slag is used in the construction of a tailings dam by the Shannon Copper Company at Clifton. This material is poured to form a solid dike across a nearby gulch, behind which waste waters from the mill are impounded. These are allowed to spill over the solid crest of the dam. This construction, 60 feet high and 220 feet long, with an approximate retaining capacity of 2,000,000 cubic feet, and at one time receiving about 300 gallons of water and slimes a minute, is stated to have entirely clarified the water, carrying 400 tons of tailings a day, from this mill for a period of more than six months."

It can hardly be said that the Arizona Copper Company was using all reasonable efforts to prevent injury to

the agricultural interests when their own superintendent says they were making no effort to keep the slimes out of the stream. If, as the evidence shows, there are three companies operating in the same district, in the same ores, using similar processes of concentration, and two of the companies avoid polluting the stream and the third company makes no effort to avoid such pollution, such company is not operating in the usual and customary manner.

As to the concentrator at Clifton, it is not intemperate to characterize the location of the mill as a wanton disregard of the rights of the water users farming lands in the Gila Valley. The company, when it located this mill, unquestionably knew that the water of the San Francisco River was used for irrigation purposes. Nevertheless, the company placed this mill directly on the San Francisco, knowing that in its operation they proposed to dump literally millions of tons of pulverized rock immediately into the stream. To a thoughtful mind, considerate of the rights of others, possible injury to the farming interests would have been instantly suggested.

(2). *Inasmuch as the company showed that at the time of the trial it had by its efforts largely minimized the injury to the appellee by the construction of works which in large part prevented the tailings from reaching the irrigation waters the injunction should not be granted.*

This contention was seriously urged in the trial court and was suggested but not seriously urged in the appellant's brief in the Supreme Court of Arizona. Whatever might have been the determination of the trial court had the appellant succeeded in as effectually stopping the flow of tailings from the Clifton mill as from Concentrators Nos. 5 and 6, it is clearly apparent that with the Clifton Concentrator still in operation at the time of the trial pouring hundreds of tons of tailings into the stream, the appellee was entitled to the injunction granted. It was only after the granting of the injunction as shown by the reports of the inspector that the conditions at Clifton were remedied. (P. 51, Transcript of Record).

(3.) *That inasmuch as to enjoin the deposit of tailings in the stream would result in the closing down of the plants*

of the appellant company, throwing thousands of people out of work, the injunction should be refused in the interest of the public under the doctrine of comparative hardship.

The doctrine of comparative hardship has no application in this case. It was pressed upon the trial court and upon the appellate court. There is no suggestion in the complaint that the works of the appellant company be shut down. The farmers recognize the fact that their prosperity is to a large extent dependent upon the prosperity of the mining companies, but they are insistant that the mining company shall not prosper at the cost of the destruction of the farming community. The record shows the entire want of necessity for any closing down of the works of the appellant company. The appellant proved in its own case that it had taken care of the tailings from Concentrators 5 and 6, and since the appellant has included in the Transcript of Record the various orders suspending the injunction and the reports of the inspector, they have demonstrated of record that they can take care of the tailings from their Clifton plant and continue to operate it.

Neither the trial court nor the Supreme Court of Arizona found that the granting of the injunction would entail any damage to the mining industry at Clifton, and upon this ground the various cases relied upon by the appellant in its brief below wherein an injunction has been refused under an application of this doctrine of comparative hardship may be distinguished. The cases which they cited below in support of the rule are:

Wees vs. Coal & Iron Co., 54 W. Va. 421, 46 S. E. 166.
Mountain Copper Co. vs. U. S., 142 Fed. 625.
McCarthy vs. Bunker Hill Co., 147 Fed. 981.
Madison vs. Ducktown Co., 113 Tenn. 335, 83 S. W. 658.

to which we may add the cases of

Bliss vs. Anaconda Copper Min. Co., 167 Fed. 342, and
McCarthy vs. Bunker Hill Co., 164 Fed. 927.

The case of Wees vs. Coal and Iron Railway Company, *supra*, was an action by private individuals to enjoin the

obstruction of two public roads by the defendant in the construction of its railroad. The question of comparative inconvenience in granting an injunction was incidentally considered.

The case of Mountain Copper Company, Limited, vs. the United States, supra, was a case before the circuit court of appeals of the Ninth Circuit. It was heard before Gilbert and Ross, Circuit Judges, and Hawley, District Judge. The opinion is by Ross, Circuit Judge, with a dissenting opinion by Judge Hawley. It is clear from a reading of the opinion that the court was convinced that to grant the injunction would result in the shutting down of a copper smelter and the destruction of a great industry.

In the case of McCarthy vs. Bunker Hill, etc., supra, the application was for a permanent injunction. The district judge found that to grant the application would result in the shutting down of the works, hence his application of the doctrine of comparative hardship.

In the case of Madison vs. Ducktown Co., supra, the court below regarded the question involved as being one resulting in the destruction of the industry. Say the court: "Shall we go further and grant the request to blot out two great mining and manufacturing enterprises, destroying half of the taxable values of a county and driving more than ten thousand people from their homes."

In the case of Bliss vs. Anaconda Copper Mining Company, supra, that court too regarded the question as being one involving the destruction of the industry. Says Hunt, J.: "Although he alleged in the amended bill that he would show that the poisonous substances emitted from the smelter could be precipitated and impounded at the smelter with very little extra cost to the defendants, he offered no proof whatsoever to support the allegation, but chose to put himself on the ground that injunction must issue which will stop the works and prevent the treatment of the only ores that defendants now smelt. Thus we are confronted directly with the underlying question whether injunction

must issue without regard to all the circumstances existing in the particular case."

In the case of McCarthy vs. Bunker Hill Co., supra, being an appeal from the judgment of the circuit court, reported in the 147 Federal 981, the court starts with the assumption that, "It is practically conceded on behalf of the appellants that the granting of the injunction to which it is insisted they are entitled must necessarily result in closing those great operations in the Coeur d'Alene region, in the depopulation of that section of the country, the destruction not only of the mining business there but the business of numerous towns * * dependent upon that industry." Assuming that such would be the result of the granting of the injunction, the court affirms the judgment of the court below applying the doctrine of comparative hardship.

Without multiplying cases, enough have been referred to to show that this doctrine has been applied by those courts which accept it only where the granting of the injunction would result in the destruction of a lawful business and great injury to the public.

The Supreme Court of Arizona declined to apply the doctrine of comparative hardship in its opinion (p. 40, Transcript of Record), the court saying:

> "However, if we felt called upon to undertake the task of comparing the injury that must result to the two communities, we are not certain that the comparison would result favorably to the appellant. While the testimony shows, and the trial court found, that the appellant has invested about fifteen million dollars and gives employment to about three thousand men, and that many others are dependent upon the operation of its properties, the testimony also discloses that but one of its three concentrators will be affected by the injunction; that the slimes and tailings from the others are impounded and do not find their way into the river; and it is not shown just what hardship will result to the corporation or community from the closing of this concentrator. Upon the other hand, the one principal industry of the upper Gila Valley, alfalfa

raising, will suffer great injury and possible destruction if the injunction be refused. The destruction of that industry, or even serious injury to it, will in a measure bring disaster to a large and prosperous community. In our opinion a court should exercise great care, but should not refuse relief where the injury is substantial and the right clear."

The findings of fact certified to this court show that the defendant has by reason of its failure to properly care for the waste from its milling plants caused a public nuisance which has already resulted in serious injury to the appellee, which injury is continuing and threatens ultimately to destroy the productiveness of appellee's land unless it is stopped. The mining company has demonstrated that it is able to abate the nuisance.

The findings of fact and the authorities cited support the judgment of the Supreme Court of Arizona, and it is respectfully submitted that such judgment should be affirmed.

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